S. HRG. 99-964

JUDICIAL DISCIPLINE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S.J. Res. 364

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

S.J. Res. 370

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REGARDING JUDGES APPOINTED PURSUANT TO ARTICLE III

AUGUST 12, 1986

Serial No. J-99-126

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

65-383 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-18

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JUDICIAL DISCIPLINE

TUESDAY, AUGUST 12, 1986

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 11:15 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Staff present: Randall R. Rader, chief counsel; and Joe Buzhardt, counsel, full committee.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITEE ON THE CONSTITUTION

Senator HATCH. This morning the subcommittee will examine two joint resolutions, Senate Joint Resolution 364, introduced by our distinguished chairman, Chairman Thurmond and Senate Joint Resolution 370, introduced by Senator Dennis DeConcini, the ranking minority member on the subcommittee. Both of these resolutions are proposed amendments to the U.S. Constitution.

Article III of the Constitution states that:

> The judges both of the Supreme and inferior courts shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

This language permits Judge Harry Claiborne, who was convicted of a Federal felony in the District of Nevada to serve as a Federal judge and draw his full salary while in prison.

Both proposed amendments under discussion today provide for automatic removal of Federal officers upon conviction of a felony and exhaustion of all direct appeals. Both were drafted in response to the case of Judge Harry Claiborne whose impeachment by the House of Representatives was recently transmitted to the Senate. However, there are essential, important differences between the two constitutional proposals.

Senator Thurmond's proposal, Senate Joint Resolution 364, applies to any officer of the United States appointed by the President with the advice and consent of the Senate.

Senator DeConcini's bill applies only to article III judges. Furthermore, the Senator's proposal contains a second section empowering Congress to establish guidelines for the Supreme Court to discpline judges who bring disrepute to the courts.

For one who has enjoyed full trial and appeal rights, the impeachment process may seem to be a little bit cumbersome and unnecessary. On the other hand, the life tenure of Federal article III judges has been the hallmark of their independence. The occasional inconvenience of impeaching errant judges may be a small price to pay for a separate and equal judicial branch of Government.

The subcommittee looks forward to examining the proposals with one of America's foremost appellate judges and a leading scholar in this particular field.

[Text of S.J. Res. 364 and S.J. Res. 370 follow:]

II

99TH CONGRESS
2D SESSION

S. J. RES. 364

Proposing an amendment to the Constitution of the United States.

IN THE SENATE OF THE UNITED STATES

JUNE 18 (legislative day, JUNE 16), 1986

Mr. THURMOND introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years after its submission to the States for ratification:

"ARTICLE —

"Any officer of the United States appointed by the President with the advice and consent of the Senate, upon

conviction of a felony and exhaustion of all direct appeals, shall forfeit office and all prerogatives, benefits, or compensation thereof.".

○

II

99TH CONGRESS
2D SESSION

S. J. RES. 370

Proposing an amendment to the Constitution of the United States regarding judges appointed pursuant to Article III.

IN THE SENATE OF THE UNITED STATES

JUNE 26 (legislative day, JUNE 23), 1986

Mr. DECONCINI introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding judges appointed pursuant to Article III.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. A judge appointed pursuant to Article III shall, upon conviction of a felony and exhaustion of all direct appeals, forfeit office and benefits thereof.

"SECTION 2. The Congress shall have the power by appropriate legislation to set standards and and guidelines by which the Supreme Court may discipline judges appointed pursuant to Article III who bring disrepute on the Federal courts or the administration of justice by the courts. Such discipline may include removal from office and diminution of compensation.".

○

●SJ 370 IS

Senator HATCH. Senator Thurmond, let me turn to you at this point.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. Thank you, Mr. Chairman.

It is a pleasure to be here this morning to receive testimony on Senate Joint Resolution 364, which I introduced, and Senate Joint Resolution 370, introduced by my distinguished colleague, Senator DeConcini.

These proposed constitutional amendments are intended to address an unacceptable quirk which now exists in our system of government. Under current constitutional law, it is possible for certain officers of the United States who have been appointed by the President with the advice and consent of the Senate to continue to receive his salary after being convicted of a felony.

Indeed, at this very time, the Senate has pending before it the impeachment trial of a Federal judge who has been convicted of a felony and who has exhausted all appeals on his conviction. This judge continues to receive a salary, the hard-earned dollars of our taxpayers, as he sits in a prison cell.

Mr. Chairman, Congress now has the power to impeach officers of the Government who have committed treason, bribery, or other high crimes and misdemeanors. However, when the courts of the Nation have found an official guilty of a serious crime, it should not be necessary for Congress to retry the official prior to his or her removal from the Federal payroll. It is outrageous that the time and energies of Congress are spent on this tedious and unwarranted process.

I am hopeful that Congress will act quickly in sending a constitutional amendment to the States to address this problem.

Mr. Chairman, we have very distinguished witnesses with us today and I look forward to their testimony.

Senator HATCH. Well, thank you, Mr. Chairman.

We have statements from Senators DeConcini and Grassley which we will insert in the record at this point.

[The following were received for the record:]

PREPARED STATEMENT OF HON. DENNIS DECONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. Chairman, I appreciate your holding the hearing today on the proposed constitutional amendments dealing with the impeachment of judges appointed pursuant to article III of the Constitution. The scope of the amendments differs but their intent reflects the dissatisfaction with the present constitutionally mandated system for removal of certain Federal officials.

For a number of years I have pursued efforts to assure that the members of the judicial branch will remain accountable for actions on their part which bring disrepute on the Federal courts or to the administration of justice by the courts. I believe in a strong and independant judiciary but I also firmly believe that we can maintain an independant third branch which is also accountable for its more egregious actions. In large part, the rule of law depends upon retaining the respect for the judges who rule on the law. My proposed amendment to the Constitution would further this goal by automatically removing a Federal judge who has been convicted of a felony and exhausted all direct appeals. I don't think anybody can seriously suggest that a person who has been prosecuted and convicted of a felony is fit to sit in judgment of others.

The second part of my amendment gives to the judicial branch the constitutional wherewithall to deal with members of the judicial branch whose actions have brought disrepute to the bench. Based on guidelines and standards legislated by Congress, the Supreme Court will be empowered to discipline judges appointed pursuant to article III. Some people may raise honestly felt, but I feel totally unrealistic, fears about exposing judges to discipline by the Supreme Court. It is inconceivable to me that the Justices might act in a venal, unjustified manner toward another judge, or that the Court would act to imperil the independent nature of the judiciary.

I have great admiration for the sitting Federal judges and the fact that occasionally the pressures and circumstances of life create a "bad apple" cannot take away from the high quality of our Federal courts. A number of those judges agree with the approach I have taken in this bill—they don't want to be associated with a "bad judge" any more than the rest of us.

I look forward to the testimony from the witnesses.

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Mr. Chairman, I want to thank you for convening today's hearing on legislation before this subcommittee regarding the removal from office of article III judges and other Federal officials convicted of felony crimes.

I also want to commend Chairman Thurmond and Senator DeConcini for their leadership in bringing this issue to the forefront.

Of course, this whole matter is highlighted by the fact that two currently sitting Federal judges have been convicted of felony crimes. One of these judges will soon be tired by the Senate after having been impeached by the House of Representatives.

Historically, the constitutional removal from office of an article III judge has been extremely rare, and consequently, a constitutional amendment may be more than what is presently necessary to deal with the problem.

Nevertheless, I look forward to exploring these constitutional responses as well as other potential administrative and legislative remedies.

I want to welcome today's distinguished witnesses and appreciate their testimony.

Senator HATCH. We will call as our first witness today the Honorable J. Clifford Wallace, U.S. Circuit Court judge in San Diego, CA.

STATEMENT OF HON. J. CLIFFORD WALLACE, JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, SAN DIEGO, CA

Judge WALLACE. Thank you, Mr. Chairman.

Senator HATCH. We are happy to welcome you to the committee. We look forward to hearing your testimony especially on this subject and look forward to calling you on other subjects through the years. You have been very helpful to the committee in the past.

Judge WALLACE. Thank you very much, Senator Hatch. I appreciate those kind comments. I have a prepared statement which I do not propose to read, but merely to summarize, if that is satisfactory.

Senator HATCH. That would be fine.

Judge WALLACE. I trust that my prepared statement will be accepted in the record.

Initially, I want to point out that I hold the two Senators who have proposed these Senate joint resolutions, Senator Thurmond and Senator DeConcini, in the highest esteem. I want to discuss some problems that I have with the two resolutions and to focus my attention in these remarks on how they impact article III judges, which is my primary concern. I would be happy, of course, to answer questions about any other aspects of the resolutions.

The first concern I have with the two proposed constitutional amendments is that they address a problem which might occur only rarely. In the history of our country, only two article III judges have been convicted of felonies which were committed during the time they were sitting judges.

It is unfortunate that both of these happened so recently, but, when put in the context of almost 200 years, the problem is almost unique. Certainly, it can be that argued that an amendment to the Constitution to provide for such a rare occurrence might, in some way, be considered as trivializing the document.

Second, on the merits of the resolutions, I have a problem with automatic removal upon conviction of a felony. Impeachment is reserved for high crimes and misdemeanors. It seems to me that the resolutions improperly equate a felony conviction with a high crime.

Perhaps it is ordinarily true that a felony conviction is a high crime, but, as I read the two resolutions, any felony, State or Federal, would qualify for automatic removal of an article III judge. But there are many felonies a person could commit which, I suggest, may not be grounds for automatic removal; for example, the destruction of a mailbox, the mailing of a firearm declared by statute to be nonmailable, poisoning an animal of another, the commission of adultery.

All of these may be improper conduct, but I wonder if they should result in the automatic removal of a sitting judge. I believe it would be improper to poison your neighbor's cat, but that conduct is a felony in one State. If convicted of that felony, should an article III judge be removed automatically from office? There is no guarantee that States in the future will not pass similar felony statutes.

A third concern deals with due process protections. Although Judge Claiborne has exhausted his direct appeal, he has brought out a collateral attack under 28 U.S.C. 2255. In some cases, a collateral attack may be successful. For example, if there were incompetent counsel, the deprivation could go to the merits of the conviction. Automatic removal, without taking into account the possibility of collateral attack, seems to me to be a mistake.

I am concerned, as I believe this committee is, with the circumstance of a sitting Federal judge receiving pay while incarcerated, but I am not sure a constitutional amendment is the best way to alleviate the problem.

It seems to me that this is an area where the Congress could consider amending its procedures to expedite the trial of a judge who has been convicted of a felony and who has exhausted his direct appeal.

In an impeachment proceeding, for example, I see no reason why the conviction of a felony and exhaustion of direct appeal could not be prima facie evidence or presumptive evidence of a ground for impeachment. If this were adopted, the House of Representatives would need only to weed out the poisoning-of-the-cat type felonies.

Almost automatically, action could be taken because the burden would be upon the felon to come forth with evidence demonstrating why impeachment should not be voted based upon the presumptive evidence.

On the trial side in the Senate, it seems to me that summary procedures are available. The basis of the trial would be the conviction of the felony. The Senate could rely upon a factfinding and judgment in the court in which an individual has been convicted of a felony and the direct appeal has been exhausted. The Senate would not need to retry the facts of conviction.

Thus, it seems to me that the burden of the felon at the trial would be to demonstrate that the felony involved is not a high crime or that there was a collateral reason why the conviction of the crime alone is not sufficient for removal from office.

Let me turn, if I may, please, to section 2 of Senate Joint Resolution 370, which allows a disciplinary procedure by the Supreme Court, including the removal of judges and the loss of salary, based upon standards and guidelines set by Congress. What are these standards? What are these guidelines?

There is no protection at all, it seems to me, in this constitutional amendment to prevent a majority of a future Congress from making inroads into the separateness and independence of the judiciary. Nothing is added by the words "bring disrepute on Federal courts." It is like "good behavior." It is a nondefined term.

These terms are substantially different from those used by the Congress in the Judicial Councils Reform and Judicial Conduct and Disability Act. There, a complaint may be brought against a judge who has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."

That administrative approach, which the Congress properly adopted in its 96th session, is not what is now suggested to this committee. I strongly caution against section 2 of Senate Joint Resolution 370.

In summary, Mr. Chairman, it seems to me that automatic removal for any felony conviction after direct appeal addresses a rare problem that could result in unintended removals, and that the proposed removal power under unspecified guidelines and standards represents a major invasion of the doctrine of separation of powers.

I think Professor Kurland properly identified the problem when he made the statement: "When dealing with so fundamental and fragile a notion as the independence of the judiciary, one ought to tread warily, lest the ultimate cost far outweigh the immediate gain."

That completes my oral summary of my statement.

Senator HATCH. Thank you, Judge.

The Claiborne impeachment has focused attention on article II, section 4, of the Constitution. This section provides for the removal of officials of the United States by impeachment for conviction of treason, bribery, or other high crimes and misdemeanors.

I have a question concerning the language of article III which allows Federal judges to "hold office during good behavior." These words seems to require a higher standard of conduct than the high-crimes language of article II. What is your understanding of the words "good behavior?"

Judge WALLACE. Well, I think, Senator, the only way to interpret properly the good behavior language is to read it in the context of the entire Constitution. There is a tension, if you treat them out of

context, between the good behavior language and the high crimes and misdemeanor.

Reading them together, the good behavior language appears to be a condition of tenure, while the impeachment language is for high crimes and misdemeanors. Interestingly enough, this came up in the House hearings on the impeachment of Harry Claiborne, and my colleague, Charles Wiggins, a former Member of the House and now a judge of our court, was asked that specific question.

I to have with me a copy of Judge Wiggins' testimony. His statement was: "The term 'good behavior' was included in the Constitution primarily to insure judicial independence from arbitrary removal from office. As such, it is a term defining tenure rather than a term defining a course of conduct. * * *" I think that is an accurate statement and I would agree with Judge Wiggins.

Senator HATCH. As you may know, Prof. Raoul Burger wrote a leading book entitled "Impeachment: The Constitutional Problems." It was published by the Harvard University Press in 1973. His thesis is that judges serve only during good behavior and that "good behavior was terminated at common law by bad behavior." He further opined that Congress could enact a statute removing a judge from office upon a conviction of a felony because that would constitute bad behavior. He notes that the first Congress enacted a law which removes a judge who accepts a bribe.

Although I am very apprehensive about any congressional attempt to define the words of the Constitution by statute, I am intrigued by Professor Berger's analysis.

Do you think Congress could pass a statute governing automatic removal for conviction of certain felonies?

Judge WALLACE. With all due respect to Professor Berger, I think his analysis is faulty.

Senator HATCH. I have to admit I believe the answer to the question is no.

Judge WALLACE. I am sorry?

Senator HATCH. I believe that the answer to the question is no.

Judge WALLACE. The argument to use the good behavior language as a basis for a statute to discipline judges was urged in the 96th Congress. At that time, Senators DeConcini and Nunn proposed legislation which used the good behavior language as a basis for a commission which would allow removal of article III judges.

There is a great amount of legislative history pertaining to that proposed legislation. For example, Senator Thurmond introduced a bill, and two or three other bills were also introduced. The final result was the Judicial Councils Reform and Judicial Conduct and Disability Act.

I testified at hearings on these bills, both in the Senate and in the House. It seemed to me then, and I am still of that opinion, that the good behavior language does not give the power to the Congress to enact a statute to remove an article III judge.

My interpretation of the Constitution is that only through the impeachment power can Congress remove an article III judge. Rather than discussing this in detail on that, Senator, I point out that I have made reference in my prepared statement to my argument and analysis given in those prior hearings in the 96th Congress.

Senator HATCH. That is interesting.

I find your argument in favor of allowing the judiciary to discipline its own members very persuasive. We have recently faced a problem in Congress with an archaic general fraud statute. It requires prosecution of Members of Congress on the basis of financial violations.

When one branch starts to wield its powers against members of another branch, I can see the prospect of an awful lot of mischief.

Would your argument remain the same if it could be shown that interbranch disciplinary procedures simply are never utilized. What would you recommend to ensure that a branch cleans its own house?

Judge WALLACE. Well, I am not sure that I would go so far as to say that they never can be adopted. For example, if a person has been convicted of a felony, the direct appeal has been exhausted, and there is no constitutional prohibition against the diminution of salary, which would be true of all nonarticle III judges, it does not seem to me that it would be out of the question for Congress to enact a statute to the effect that a member of the executive department, or for that matter a Member of Congress, could not draw a salary during the time he or she is in jail.

I am not sure that that would be an impermissible interference, and it could alleviate the problem that Senator Thurmond has properly identified: That most Americans feel it is intolerable to have a person drawing a Federal salary when he is in jail and cannot perform his job.

I am not convinced that the Congress could not adopt a statute that would prevent that from occurring for anyone other than an article III judge. That would alleviate a problem and is an interbranch solution.

But, a more difficult problem is requiring removal from office. It seems to me that if a problem occurs in the executive branch, it is the responsibility of the President to remove a felon from office. If an article III judge is involved, the impeachment process must be used.

I think that the Judicial Conduct and Disability Act goes a long way in assisting the Congress with its concerns about the judiciary. I am not sure it has resolved all of them, but I believe we must bear in mind your earlier important point about interbranch interference.

Efficiency is important in Government; there is no question about it. But there are basic doctrinal concerns, such as separation of powers, which must also be considered. We must preserve those parts of our philosophy of government, that have made it great; history tells us that the separation of powers doctrine has been of fundamental importance in keeping this a free country.

Senator HATCH. That is right.

Judge WALLACE. We must be on guard against the theory that efficiency is the most important value. A benevolent dictator is still a dictator.

Senator HATCH. I thank you for answering my questions.

Senator Thurmond, do you have any questions for Judge Wallace?

The CHAIRMAN. Thank you very much.

Judge WALLACE, we want to welcome you here. We look upon you as one of the ablest members of the judiciary and it has been a great pleasure to be associated with you at various times.

Judge WALLACE. Thank you, sir.

The CHAIRMAN. Incidentally, we jogged together down at Williamsburg. Do you still jog?

Judge WALLACE. You bet I do, sir.

The CHAIRMAN. As I understand, you take the position that we could pass a statute under which we could remove anyone except an article III judge.

Judge WALLACE. I took the position that, other than article III judges, you could adopt a statute which could prevent a person from receiving a salary while he or she was in prison. I did not touch upon whether or not a statute could be adopted for removal.

The CHAIRMAN. Well, could you pass a statute, do you think, that could remove them, in addition to stopping their salary?

Judge WALLACE. Stopping the salary is an easier question. I assume the dismissal statute would provide for removal of employees of the executive and congressional branches and employees in the judicial branch, other than article III judges, who are felons in prison. My judgment is that I do not see anything in the Constitution that would prevent it, but I have not focused upon the question.

The CHAIRMAN. But you think you would have to have a constitutional amendment to remove an article III judge?

Judge WALLACE. I do, sir.

The CHAIRMAN. And on that, I believe you feel that might be unwise?

Judge WALLACE. That is my opinion.

The CHAIRMAN. Maybe the constitutional amendment, then, is too broad. For instance, there might be some crimes that you mentioned that would not deserve impeachment. Sometimes we call some things felonies that are not as serious as some other things we call misdemeanors in the different States.

Now, would you support an amendment which applied only to serious felonies if more narrow language could be drawn? Do you feel we could draw a constitutional amendment to that effect?

Judge WALLACE. I would still have reservations for reasons. First, determining what felony would be considered serious leaves too much to a judgment call. To a cat lover, poisoning a cat may be very serious.

Second, I have some concerns about whether the problem is too rare to require a constitutional amendment. Only Judge Claiborne, and now Judge Nixon, have presented this problem in a 200-year period. Should the Constitution be amended for that rare a problem? I understand the concern you have, Senator; it is mine, too. But I do not believe an amendment is necessary.

Third, there are times when even conviction of a felony and a direct appeal have not rooted out whether that conviction is valid. For that reason, a collateral attack is allowed under 28 U.S.C. 2254 and 2255.

Although many of the collateral attacks do not go to the merits of the conviction, some of them do. Having automatic removal upon conviction and exhaustion of direct appeal does not allow

those due process protections to be considered before the judge is removed.

It seems to me that for these three reasons, I would caution against such an amendment.

The CHAIRMAN. In the event that the Senate should impeach Judge Harry Claiborne or any other Federal officer, what opportunities are available for judicial review of such impeachment?

Judge WALLACE. I do not know of any, Senator.

The CHAIRMAN. In other words, if the Senate impeaches after the House brings charges and the Senate acts, you feel no further appeals could be made?

Judge WALLACE. I do not know of any, nor would I recommend any. It seems to me that that is something that is wholly in the dominion of the Senate.

The CHAIRMAN. In the event that it is ruled that a summary-type impeachment process is not constitutional even in the case of a convicted felon, would you view the constitutional amendment approach differently?

Judge WALLACE. I am sorry. I did not get the question, Senator.

The CHAIRMAN. In the event that it is ruled that a summary-type impeachment process is not constitutional even in the case of a convicted felon, would you view the constitutional amendment approach differently?

Judge WALLACE. I think I would take a second look at it. I believe that the procedural modification of the process is necessary. If a court held it had jurisdiction to review this business of the Senate, struck the procedures, and the judgment became final, I think I would look again at the constitutional amendment process.

The CHAIRMAN. Judge, I want to thank you very much. I am glad to see you again and I am glad to have you here.

Judge WALLACE. Thank you, Senator.

Senator HATCH. Thank you, Judge. Your testimony has been excellant.

The CHAIRMAN. Thank you.

Senator HATCH. Thank you, Senator Thurmond. Judge Wallace, we wish you well on your return trip to California.

Judge WALLACE. Thank you for inviting me, Senator. I have enjoyed discussing these issues with you.

Senator HATCH. We intend to invite you a lot more.

The CHAIRMAN. I predict you will live to be 110 years old; you stay in such good shape.

Judge WALLACE. Sir, I am going to invite you to my birthday party at 110, and I expect you to attend there.

Senator HATCH. Well, he is already 91. [Laughter.]

I want to commend Senator Thurmond for wanting to do something about this situation. You have made some pretty good points. We really have to take them into consideration.

I know what the distinguished chairman of the committee wants to do. He is a leader in these areas and we really appreciate him.

[The prepared statement follows:]

Prepared Statement of J. Clifford Wallace

My name is J. Clifford Wallace. I am a judge of the United States Court of Appeals for the Ninth Circuit. I reside in San Diego, California. I speak only for myself.

I appreciate the opportunity of testifying at the request of this Committee on S.J. RES. 364 and 370, each of which proposes an amendment to the Constitution of the United States.

I will first discuss S.J. RES. 364 and section 1 of S.J. RES. 370, both of which propose the forfeiture of office and all benefits thereof upon conviction of a felony and exhaustion of direct appeal. S.J. RES. 370 limits itself to Article III judges, while S.J. RES. 364 includes any officer appointed by the President with the advice and consent of the Senate. In addition to Article III judges, I assume S.J. RES 364 would include ambassadors, cabinet members, heads of departments, certain members of regulatory agencies, the Librarian of Congress, the special counsel of the Merit System Protection Board, and numerous other officers, and would, I am informed, total 2,143 non-career officers appointed by the President with the advice and consent of the Senate.

Senator Thurmond's statement in the Congressional Record in support of S.J. RES. 364 indicates that at least one of its purposes, if not its principal one, is to assure that civil officers who are guilty of a serious crime are promptly removed from the federal payroll. Assuming Congress presently has the power to enact statutes that would remove from the federal payroll civil officers, other than Article III judges whose salary may not be diminished, upon conviction of a felony, perhaps S.J. RES. 364 is unnecessarily broad. However, I feel most qualified to testify concerning S.J. RES. 370, which proposes forfeiture only as to Article III judges, and therefore will direct my comments specifically to that proposed amendment.

The problem that section 1 of S.J. RES. 370 is intended to resolve has been highlighted recently by the conviction of

Judge Harry E. Claiborne, a sitting district judge in the United States District Court for the District of Nevada, his impeachment, and his incarceration at a time when he is receiving his full salary. Apparently, this was the first time in the history of our judiciary that a sitting Article III judge had been convicted of a felony alleged to have occurred while he was a sitting judge. See Report of Committee on the Judiciary of the House of Representatives on Impeachment of Harry E. Claiborne, p. 24; N.Y. Times, April 2, 1986, at 10. Unfortunately, it has already happened again. Judge Walter L. Nixon, Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted in March of this year for lying to a grand jury and sentenced to five years in prison. Judge Nixon has apparently refused to resign, and continues to collect his federal salary pending the appeal of his conviction.

The rarity of its occurrence, however, cautions against use of the amendment process. In fact, it appears that only three sitting Article III judges have ever been charged with committing a felony. See Nat'l L.J., February 17, 1986, at 1. The Constitution was not meant to be a working handbook for the administration of our country. The Framers intended the Constitution to establish fundamental principles by which this country should be governed rather than to outline specific responses to individual problems. The wisdom of this theory of governance is attested to by our nearly 200 years of success in developing the finest system for administration of justice in the modern world. Ruling out such a conclusion on the argument that it is merely coincidence overlooks the proof of history. I suggest that one should treat the amendment process with extreme caution. When the problem occurs so rarely, it can be argued persuasively that use of the amendment process somewhat trivializes the document itself.

A second problem goes to the merits of the amendment. Apparently, from its wording, conviction of any felony (state or federal) would result in automatic removal after direct appeal has

been completed. I assume the nature of the amendment is to equate felony conviction with "other high crimes and misdemeanors." U.S. Const. art. II, § 4. Certainly, it is not envisaged that there should be automatic removal of an Article III judge for something less than commission of a serious crime. Yet, how can one be sure that all federal, and particularly all state felonies fall within that class. For example, can it be said that the conviction of any one of the following felonies is so serious that a sitting Article III judge should automatically lose his or her office: destruction of a mailbox, 18 U.S.C. § 1705; mailing of a firearm declared nonmailable by statute, 18 U.S.C. § 1715; poisoning of an animal owned by another, Idaho Code § 18-2101(19); or adultery, id. § 18-6601. Automatic forfeiture of office also may be inappropriate should a felony conviction result in a minimal fine rather than imprisonment, thus reflecting a more technical rather than serious violation of the law. Moreover, there is no guarantee that future state and federal felony classifications will equate with "other high crimes and misdemeanors."

The automatic loss of office upon exhaustion of direct appeal also may implicate due process concerns. Questions often arise pertaining to the conviction of a felony which cannct, under the rules of our court, be ventilated on direct appeal. This fact is the reason for collateral appeals, such as those provided in 28 U.S.C. §§ 2254 and 2255. This opportunity to explore fully the process of conviction sometimes results in reversal of the felony conviction. I question whether a sitting federal judge should be automatically removed from office before he or she exercises, at least in a timely fashion, the right of collateral attack.

This is not to say, however, that there is not a problem that needs to be addressed. The prospect of an incarcerated Article III judge continuing to draw federal pay after conviction of a felony and exhaustion of direct appeal strikes, I am sure, the average person as inappropriate. Even if a constitutional amendment is not justified, there are other ways of ameliorating the problem.

A similar issue arose during the time that Congress was considering this general problem in the 96th Congress, which led to the formulation of the Judicial Councils Reform and Judicial Conduct and Disability Act, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. §§ 331, 332, 372, 604 (1982)). It seemed to me at that time, and my views have not changed, that there is a place for judicial discipline by the Judicial Councils of the Circuit, but that the councils should not be the exclusive actor. The Judicial Council of the Circuit can deal with the vast majority of cases. The serious cases, however, may sometimes be resolved better in a different fashion. One example of conduct that can be handled properly by the Judicial Council of the Circuit, which is not addressed in S.J. RES. 370, is conduct that should be considered as a basis for impeachment but that does not involve the commission of a felony. Here, it was thought that the Judicial Council of the Circuit could undertake the investigation, refer the matter to the Judicial Conference of the United States which, if that body found it appropriate, could forward the matter to the House of Representatives. It was thought that by developing a record, it would not be too difficult a task to proceed with the impeachment process.

The conviction of a felony presents a different situation. The reason for the impeachment is because of the conviction of a felony. If that conviction is valid, it seems to me that the record has been made and there is no reason for the Judicial Council of the Circuit action qua impeachment. The only reason for council action would be to keep the federal judge from sitting on cases prior to removal.

The question then arises whether there are options to a constitutional amendment for automatic removal after conviction of any felony and exhaustion of direct appeal. It would appear that the answer has to be in considering a more efficient method for impeachment and trial in felony conviction cases. For example, although the impeachment process is civil in nature, it is

somewhat analogous to indictment. It seems to me that within the general framework of due process guarantees, Congress has the power and the ability to formulate procedural rules. One such procedural rule could be that conviction of a felony and exhaustion of direct appeal would be presumptive or prima facie evidence of the grounds for impeachment. If this rule were adopted, the question before the House would be a narrow one, only looking to whether the felony conviction was invalid because of some exceptional ground while still giving presumptive effect to the court finding. It can be argued that when the judicial process has gone as far as exhaustion of direct appeal, it would not be inappropriate for the House to rely upon that process and treat it as prima facie or presumptive evidence of the basis for impeachment. On the other hand, although the proceeding itself could be swift, it would allow the House at least to consider whether the poisoning of a cat or the blowing up of a mailbox is sufficiently egregious to warrant impeachment.

The next problem deals with trial in the Senate. Several considerations might be discussed. Where the basis of the impeachment is a conviction of a felony, as distinguished from other trials brought to the Senate by way of impeachment, it would seem that a summary process is in order. While the Senate must assure itself that the conviction is valid and that there are no circumstances which appear to endanger the conviction based upon a possible collateral attack, why should the Senate be required to retry the felony conviction. A summary process accepting the felony conviction and investigating only those matters which would in fact endanger the validity of the conviction could be the area of focus.

If additional facts needed to be developed, the Senate, it seems to me, has methods available that could be used in further factual development. For example, the committee process has worked well before in areas such as this. If there are substantial factual allegations that must be developed, it has

been suggested that a neutral magistrate could be appointed to develop those facts and present a recommendation to the Senate. The impeachment trial would then be based upon the record, a procedure comparable to that which is now used in appeals to federal agencies. See Stolz, Disciplining Federal Judges: Is Impeachment Hopeless, 57 Calif. L. Rev. 659, 669-70 (1969).

I suggest that before Congress takes the extreme step of voting for a constitutional amendment, that consideration be given to procedural rules that may well make the impeachment process more workable in cases involving Article III judges who are convicted of a felony. Because impeachment of a sitting federal judge who has committed a felony is such a rarity, it would seem appropriate to consider all possible solutions before utilizing the constitutional amendment process.

I now turn to section 2 of S.J. RES. 370, which would grant to Congress "the power by appropriate legislation to set standards and guidelines by which the Supreme Court may discipline judges appointed pursuant to Article III who bring disrepute on the federal courts or the administration of justice by the courts." You will note that there are no limitations to the standards and guidelines designated in the amendment. While we can always hope that appropriate standards and guidelines would be made, the Constitution was established to guarantee something more than mere hope. The Framers deliberately incorporated the principle of separation of powers into the Constitution to create a tripartite form of government that could guarantee, as best a government can, the rights of individual citizens. It is true that more efficient systems could be devised, but efficiency is not the sole mark of good government. Even a benevolent dictator is still a dictator.

It seems obvious that Congress could, by means of the power it would be granted by S.J. RES. 370, interfere substantially with the workings of the judiciary, a coequal but separate branch. It does not take much imagination to envisage

standards and guidelines developed by a strongly entrenched majority that could keep federal judges from properly exercising their responsibility to protect the rights of a minority, even when the exercise of those rights are strongly opposed by the majority. It is, of course, all well and good to say that Congress does not have that in mind, and I do not believe the author of the amendment does. But it is the possibility of misuse that must be guarded against.

What are these standards and guidelines? How are they different from the exercise of discipline currently allowed through the Judicial Councils Reform and Judicial Conduct and Disability Act? The amendment suggests that the standard would be enforced against any Article III judge who would "bring disrepute on the Federal courts or the administration of justice by the courts." Such generality provides precious little guarantee that the doctrine of separation of powers would be adhered to and that the independence of the judiciary would be free from attack. By way of contrast, the Judicial Councils Reform and Judicial Conduct and Disability Act provides for a more limited area of inquiry. The Judicial Council of the Circuit has the authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1). Based upon this power, the Act provides for the filing of a complaint against a circuit, district, or bankruptcy judge, or a magistrate who "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). This "administrative" approach was adopted by Congress rather than an "inquisitorial" method to deal with complaints against judges and magistrates. On close examination, the difference between these two approaches becomes obvious.

This is not a new argument. The language of section 2 of S.J. RES. 370 is similar to legislation introduced by Senator Nunn in the 93rd, 94th, and 95th Congresses, and to legislation

introduced by Senator Nunn and Senator DeConcini in the 96th Congress. I will not extend my testimony by analyzing why I believe the approach that was adopted by Congress is far superior to that proposed by Senators Nunn and DeConcini and to that developed in section 2 of S.J. RES. 370. Rather, I will adopt by reference my testimony in hearings held May 8, 1979, on S. 259, S. 522, and S. 678 before the Subcommittees on Judicial Machinery and Constitution of the Committee on the Judiciary of the United States Senate, 96th Congress, 1st Session, pages 34-43; and to my testimony before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Judiciary Committee of the House on July 13, 1979, 96th Congress, pages 72-85.

Nor do I believe that the independence of the judiciary is not threatened merely because section 2 designates the Supreme Court as the enforcing body. The Supreme Court would be governed by the "standards and guidelines" established by Congress. Therefore, the same problem described above would be involved, regardless of the enforcing instrumentality used.

In Senator DeConcini's statement in support of section 2 of S.J. RES. 370, he refers to what he describes as the failure of the present system under the Judicial Councils Reform and Judicial Conduct and Disability Act. In arguing that the Act has been largely ignored, he states that the courts "have not even come up with rules and guidelines for the conduct of their operation." In actuality, every circuit has adopted rules to implement the Act. They are not identical rules, but it seems clear that Congress wanted a certain degree of experimentation as the Judicial Councils of the Circuit launched into this area. Over a period of time, experience has been gained.

To assist the councils, there has been cooperation and discussion at the highest level. In connection with the semi-annual meeting of the Judicial Conference of the United States, the Chief Judges of the Circuits meet separately to consider items of business. It is through the Conference of Chief Judges that illustrative rules are being developed with the assistance of the

Federal Judicial Center. The first draft of the illustrative rules was circulated to approximately 1,000 people. There were approximately 100 comments received. Another draft has been completed as a result of this process, and is presently pending before, Chief Judge Clark of the Fifth Circuit, former Chief Judge Seitz of the Third Circuit, and Chief Judge Browning of the Ninth Circuit, the three Chief Judges selected to represent the Conference of Chief Judges as a drafting committee. I am advised that the final draft of the illustrative rules with a commentary will be presented to the Conference of Chief Judges for their consideration in September of this year. The cooperative venture is not designed to dictate uniformity, but to assist each circuit with meeting its needs.

Nor do the statistics indicate that there has been a lack of activity in enforcing the Judicial Councils Reform and Judicial Conduct and Disability Act. Pursuant to the request of Congress, statistics are kept by each circuit. Far from representing inactivity, they indicate that the process has been implemented and that complaints made by individuals can now be heard. Reports from all but one circuit for the year July 1, 1985, to June 30, 1986, indicate that 299 complaints were filed and of those, 265 were terminated. See Exhibit A.

As one who has been involved directly in the process of the Judicial Councils, I can assure you that I have observed its successful operation. I emphasize that the success of the procedure should not be measured by the number of actions the council is required to take against judges in a given year. The process is working at its best when problem judges are corrected in a quiet and efficient manner. The problem is solved and a good judge is saved. There may not be a headline, but that should not be the mark of success.

My judgment is that section 2 of S.J. RES. 364 is ill-advised, and I would strongly recommend that it not be approved.

EXHIBIT A

COMPLAINTS OF JUDICIAL MISCONDUCT*
(July 1, 1985 - June 30, 1986)

Circuit	Filed	Terminated	By Chief Judge	By Judicial Council
Fed.	11	11	11	--
DC		(Not Yet Available)		
1	38	38	15	23
2	53	45	34	11
3	25	22	17	5
4	24	24	24	--
5	22	22	22	--
6	17	14	14	--
7	8	8	8	--
8	23	22	22	--
9	42	37	37	--
10	18	2	2	--
11	18	20	20	--
TOTALS	299	265	226	39

*Tentative data supplied by SARD-AO.

Senator HATCH. Our final witness will be Prof. Stephen Burbank, professor of law at the University of Pennsylvania Law School. Professor Burbank was a former law clerk to Chief Justice Warren Burger. We are very happy to have you with us. We welcome you to the committee and look forward to hearing your testimony.

STATEMENT OF STEPHEN B. BURBANK, PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Mr. BURBANK. Thank you very much, Mr. Chairman. I hope that my prepared statement will be accepted in the record, and I will follow Judge Wallace's lead and simply summarize my testimony.

I will follow Judge Wallace's lead in another respect, in that I agree with just about everything he said. I think this is significant because he and I have not agreed about certain matters having to do with judicial discipline in the past. I am generally regarded as the most interested nonjudicial observer, as well as the most vigorous critic, of the judiciary's implementation of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. In that respect, I think there are a number of Federal judges, perhaps including Judge Wallace, who have regarded me as a pest in my writings and testimony.

However, on the matter before this subcommittee, I wholeheartedly agree with Judge Wallace, and therefore, I am particularly happy to be able to testify today. I do not think that, whatever problems exist in current statutory or constitutional provisions concerning the integrity of the Federal judiciary they justify the extraordinary remedy of a constitutional amendment. Passing the question of legal vehicle, I do not think that either of these Senate joint resolutions represents good public policy. Finally, I think both of them are flawed in more technical respects.

Everybody seems to agree that Judge Claiborne's situation is a scandal. I think we have to be very careful, however, in identifying what is the cause of our distress and what are the best cures among those available.

As to the cause, I think we ought to look directly to Judge Claiborne, himself. He has not done the honorable thing and has not seen fit to resign, although he should have resigned.

We should remember, however, that his conviction became final only at the end of April, and that, therefore, we are dealing with a relatively short period of time. Should we be scandalized by the fact that Judge Claiborne has not been removed since April 21 when the Supreme Court denied his petition for certiorari, or May 1 when the conviction technically became final?

I think not. In fact, I think it is quite remarkable—since we have not had an impeachment in more than 50 years, although we have come close—that within 3 months from the time that Judge Claiborne's conviction became final, the House was able to vote articles of impeachment, a vote that was preceded by a hearing at which Judge Claiborne had the opportunity to participate and informed by a meticulous and painstaking report of the House Judiciary Committee.

The House's record is, of course, even more remarkable when one remembers that it did not begin its process until early June and that it had other important business to attend to.

Now, some Members of Congress may believe that the House would have impeached Judge Claiborne sooner if the judiciary had acted more quickly under the 1980 act. Here, I would also disagree, although I think this process has highlighted some questions about the respective roles of the judiciary and of Congress in matters that may call for the impeachment and removal of a Federal judge.

The long and the short of it, in my view, is that the certification process in the 1980 act—those provisions of the 1980 act that provide for certification by a judicial council and then by the judicial conference in cases where the conduct of a Federal judge may warrant impeachment—was not conceived with a case like Judge Claiborne's in mind; that is to say, in a case like Judge Claiborne's, there is no need for the certification process to bring the case to the attention of the House of Representatives. It was not necessary in Judge Claiborne's case—as Senator Thurmond said back in 1980—to isolate his misconduct. There was no need to develop a record of proceedings revealing that misconduct. Court records already did that.

I cannot myself—but perhaps this just indicates that I am not a politician—take seriously that in the case of a convicted felon there is some political benefit to the Congress in having these certifications.

So, in general, even though the language of the 1980 act formally comprehends a case like Judge Claiborne's, I do not think that those provisions really were designed to deal with a case like Judge Claiborne's. Accordingly, I do not think there is any surprise in the fact that the judiciary was a little bit uncertain as to what it should be doing. Of course, ultimately, both the judicial council of the Ninth Circuit and the Judicial Conference of the United States did certify what was obvious to everybody; namely, that Judge Claiborne's conduct might warrant impeachment and removal.

In the future, in terms of what could be done, if the Congress believes that this certification process is useful even in a case like Judge Claiborne's—and there may be cases that will come to the attention of the judiciary through this process, through the 1980 act, before they come to the House's attention through the newspapers and constituents—Congress could amend the act, if it were going to amend the act for other technical reasons, to specify those court records that should accompany any certifications that come from a judicial council or the Judicial Conference.

But, again, I really do not think that the certification process was made for a case that is all over the newspapers and that everybody knows about.

Now, if one agrees, as I think, that the House acted with remarkable dispatch and scrupulous fairness in Judge Claiborne's case, then there are only two questions. Is the Senate prepared to do the same, and are the burdens that a case like Judge Claiborne's imposes on both the House and the Senate justifiable?

Well, I assume, of course, that the Senate is prepared to accept its constitutional responsibilities. Moreover, I would agree with Judge Wallace that the burdens of the impeachment and removal

process can be substantially minimized, and that they should be substantially minimized, in a case like Judge Claiborne's.

The Senate rules, as I understand it, already provide for the accomplishment of certain tasks by a committee of less than the whole. More important, when the facts upon which articles of impeachment are based have been established beyond a reasonable doubt in a criminal trial and all avenues of direct review have been exhausted, I think it is more important that the Senate preclude redetermination of those facts; that is to say, on this view, the only questions that would be open in the trial before the Senate would be whether the facts revealed by the record are such as to constitute an impeachable offense. Here are the facts established by the record. Do those facts reveal conduct that should be grounds for impeachment and removal in the case of a Senate trial? There would also be the question whether the Senate chooses to permit any defenses to Judge Claiborne. I would say that such defenses should not be permitted to the extent that their factual predicate is foreclosed by a criminal record.

What I am doing, in other words, is explaining on a slightly different ground—by resort to well-recognized principles of collateral estoppel or issue preclusion—what the House talks about in terms of legislative or judicial notice.

This is generally the view developed in the House Judiciary Committee's report, one suggested by Judge Wiggins. It happens to be a view with which I concur. The point, again, is that the burdens, although they are not to be slighted, can be minimized.

Then the final question is, given an appropriately streamlined process in a case like Judge Claiborne's, are the burdens nonetheless justified? Here, it seems to me, you must recognize that, no less than impeachment, in the words of Lord Bryce, a constitutional amendment is very heavy artillery.

It seems to me highly questionable whether that very heavy artillery should be resorted to to deal with a situation that has occurred but once in our history and that may never reoccur.

The transaction costs, if I may use the language of economics, to the Congress of any speculative future cases like Judge Claiborne's are not, it seems to me, likely to exceed the very substantial transaction costs that must attend the ratification process, requiring the ratification by three-quarters of the States of any constitutional amendment.

And apart from that, in terms of total costs and benefits, I would share Judge Wallace's view that automatic removal raises more questions than it answers. In my prepared testimony, I have put to you a case of a Federal judge who is convicted in a State court of a felony involving consensual sexual conduct with a member of the opposite sex, which is a possibility, I believe, under certain State laws, and ask the question whether Congress would be happy to surrender the power which it now has independently to judge whether that individual is qualified to continue in judicial office.

I would simply add to Judge Wallace's analysis that if we go down that road, we are giving a very powerful tool to local prosecutors not only to exercise discretion, but to do so using criminal laws about which there is no national consensus.

In terms of that aspect of Senate Joint Resolution 370 that goes beyond Senate Joint Resolution 364 and would empower Congress to set standards and guidelines by which the Supreme Court may discipline judges, I agree with Judge Wallace that, as a matter of public policy, this provision is neither necessary nor wise.

The fact is that the record of the judicial councils under the 1980 act indicates that the 1980 act is working. Again, I have been the most vigorous critic of the judiciary's implementation of that Act. The focus of my criticism, however, has been procedural rulemaking under the act. All of the councils have rules. I think there is room for improvement. A project currently underway, staffed by the Federal Judicial Center, may very well take us a long way toward the progress that I as a scholar would like to see.

But for the purposes of this hearing, the most important point is that the record has not been one of inactivity. Hundreds of complaints have been considered. I am not aware of any case in which a chief judge, an investigative committee or a council has failed to take seriously its responsibilities with respect to those complaints.

The fact that so few complaints have led to investigations and that fewer still have led to sanctions under the act seem to me not to speak of inactivity, but rather of the distinguished caliber of our Federal judiciary.

In other words, it seems to me that the experience under the 1980 act has proved what Senator DeConcini said in 1980; namely, "the problem addressed is more one of perception than actuality."

As to public policy, it seems to me we would be very foolish to give to Congress, by constitutional amendment, a blank check to set standards and guidelines for the discipline, including the removal, of Federal judges. That, it seems to me, is an invitation to the domination of one branch of government by another that should be as unacceptable today as it was to the framers 200 years ago. It is no answer that the Supreme Court would be the instrument of Congress for these purposes, for the Supreme Court is bound, of course, not only by the Constitution, but by legislation, and it would be able to protect the independence of the judicial branch only so much as the legislation implementing this proposed constitutional amendment would permit.

As to the standard set forth—the proposed constitutional standard of bringing disrepute on the Federal courts or the administration of justice by the courts—I understand that this has been a favorite of Senator DeConcini's for a long time. But the capacity of that standard to lead to mischief was well documented in the debates and deliberations that preceded the passage of the 1980 act, when it was rejected. I myself am not willing to trust to future Congresses, in enacting implementing legislation, to follow a principle of generality. Even if I were, it seems to me that the independence of individual Federal judges would be at risk under disciplinary standards and procedures of that vagueness.

Finally, with respect to this second provision of Senate Joint Resolution 370, I find it extraordinary, when the trials and tribulations of the Supreme Court in handling its judicial business are so well known, that this proposed provision would transfer, as I read it, all of the responsibilities currently conducted by the judicial councils of the circuits to the Supreme Court. If the Supreme Court

is laboring now, I cannot imagine how it could possibly handle all of these complaints, which are time consuming, as I am sure Judge Wallace could attest.

So in closing, Mr. Chairman, I am sorry to have been so negative about these joint resolutions, but I hope that, in the course of my testimony, I have made some suggestions that would advance the possible refinement of current arrangements, which I think are more than adequate to deal with the problem of Judge Claiborne and any similar problems in the future.

Thank you.

[Prepared statement and letter to Senator Hatch follow:]

Prepared Statement of Stephen B. Burbank

Mr. Chairman and Members of the Subcommittee, I appreciate the invitation to testify before the Subcommittee, and I hope that my comments are helpful in your consideration of these Joint Resolutions, both of which propose constitutional amendments to deal with perceived problems in current arrangements that safeguard the integrity of the federal judiciary.

At the outset, it may be helpful to the Subcommittee if I outline my background and experience in the area of judicial discipline and disability. Early in my academic career at the University of Pennsylvania, I was privileged to serve as co-reporter of the Third Circuit's rules to implement the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, and I have since served as reporter of amendments to those rules. In addition, and as a natural outgrowth of my work as reporter, I have published two articles on the 1980 Act and its implementation by the judicial councils of all the circuits,[1] consulted for various committees of the judiciary charged with studying the Act's implementation, and testified before the Subcommittee on Courts of the House Judiciary Committee at oversight hearings.[2]

I believe it is fair to say that I am regarded as the most interested non-judicial observer, as well as the most vigorous critic, of the judiciary's implementation of the 1980 Act. I am also very interested in Senate Joint Resolutions 364 and 370. In my view, whatever the defects in existing constitutional and statutory provisions, they do not justify the extraordinary remedy of a constitutional amendment. Moreover, the question of legal vehicle aside, I believe that both Senate Joint Resolutions 364 and 370 are unwise as a matter of public policy and that they are flawed in more technical respects.

It is evident that recent events concerning Judge Harry Claiborne were the immediate animating cause of these Joint

Resolutions. Everybody seems to agree that a federal judge who has been convicted of willfully and knowingly falsifying federal income tax returns, who has exhausted opportunities for direct judicial review, and whose chambers are currently located in the Federal Institution at Maxwell Air Force Base, should no longer be called "his honor" and should not be able to shop at the PX on a federal judge's salary. We can agree, then, that the existing state of affairs is, as it has been called by numerous members of Congress, a scandal. We should be careful, however, in identifying the cause of our distress and its cure.

As to cause, I believe that we should look to Judge Claiborne rather than any failure of process. Representative Sensenbrenner concisely catalogued a "number of dubious distinctions that [Judge] Claiborne has achieved," including that he is "the first sitting Federal Judge in [our] history to go to prison" and the first "to refuse to resign before going to prison."[3] We should recall that further direct review of Judge Claiborne's conviction was foreclosed only on April 21, 1986 (when the Supreme Court denied certiorari). If we concede to a convicted judge the privilege of remaining in office and drawing salary and benefits until that point, the scandal has subsisted for a relatively short time. Its primary cause is Judge Claiborne himself, who, in refusing to resign, reminds us that not all thieves are honorable.

The question remains whether the failure to remove Judge Claiborne since the end of April should fairly be deemed an independent cause for concern. I think not; in reaching that judgment, I necessarily consider both issues of cause and possible cures.

We have not had an impeachment, although we have come close, in fifty years. Given that history alone, I find it extraordinary that, within three months from the time Judge Claiborne's conviction became final, the House of Representatives was able to vote Articles of Impeachment,[4] a vote preceded and informed by

searching inquiry that included a hearing in which Judge Claiborne had the opportunity to participate[5] and a painstaking report of the House Judiciary Committee.[6] The House's record in this respect is, of course, even more remarkable when one considers that its process did not begin until early June[7] and that other important public business was competing for its attention.

Some members of Congress may feel that the process would have commenced earlier, and that Judge Claiborne would have been impeached sooner, if the judiciary had acted more promptly under the 1980 Act. I doubt it, although there is no doubt that this experience has highlighted questions concerning the respective responsibilities of the judiciary and Congress in a matter that may call for impeachment and removal of a federal judge.

It is no surprise that there was uncertainty concerning the role of the judicary under the 1980 Act in Judge Claiborne's case. To be sure, the language of the Act authorizes a judicial council to make a determination that a judge "has engaged in conduct . . . which might constitute one or more grounds for impeachment" "on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council."[8] But there is a non-frivolous question whether the underscored language nonetheless contemplates a proceeding begun by complaint. Certainly, that was the exclusive frame of reference for similar provisions in the 1980 Act's antecedents, the March 1979 principles approved by the Judicial Conference,[9] and H.R. 6330.[10] Moreover, the explanations of the pertinent language in the House Report[11] and on the Senate floor[12] are not inconsistent with that view. On the other hand, because "any person,"[13] including a judge, can file a complaint under the Act, this line of inquiry may be regarded as beside the point.

The important point, however, is that, in Judge Claiborne's case and cases like it, the process and procedures established by the Act could and can be of little service to the Congress. Judge

Claiborne's case had already been brought "to the attention of the House of Representatives."[14] It was not necessary, in Senator Thurmond's words, "to isolate" his misconduct, and there was no need to develop "a record of proceedings revealing misconduct which might constitute an impeachable offense."[15] Court records already did that. Finally, I cannot take seriously the notion that the certificates of a judicial council and the Judicial Conference are, in the case of a convicted felon, politically useful to the Congress.

In sum, I do not believe that the certification process in sections 372(c)(7)(b) and (c)(8) was conceived to deal with a case like Judge Claiborne's even if the language used formally comprehends it. It may be that, in future such cases, if there are any, prompt certification by a council and the Conference would bring a similar situation to the attention of the House of Representatives before newspapers and constituents did so. Moreover, if Congress determines to amend the Act, it may wish to specify the court records that should accompany the certifications.[16]

If one believes, as I do, that the House acted with admirable dispatch, as well as scrupulous fairness, in Judge Claiborne's case, one may still be concerned whether the Senate is able to follow suit. In addition, one may question whether the burdens imposed on both bodies in a case like this are justified.

As to the first question, I assume that the Senate is prepared to accept its constitutional responsibilities. Moreover, although I am not an expert in constitutional law, I believe that the Senate can properly and fairly minimize the burdens of a trial in a case like Judge Claiborne's. Thus, as I understand it, Senate Rules already provide for the delegation of certain responsibilities to a committee of less than the whole. More important, where the facts upon which Articles of Impeachment are based have been established beyond a reasonable doubt in a

criminal trial, and avenues of direct review have been exhausted, I believe the Senate is free to, and that it should, preclude re-determination of those facts. On this view, the only questions open in a Senate trial would be whether the predicate facts for the criminal conviction constitute an impeachable offense, and whether, if so, the Senate chooses not to convict by reason of any defenses permitted to the respondent. Again, in my opinion, the Senate should not entertain defenses foreclosed as a factual matter by an antecedent judgment of conviction.[17]

In advancing these suggestions, I elaborate the view of the role of Congress in a case like Judge Claiborne's that is suggested in the House Report accompanying his Articles of Impeachment,[18] adopting as a helpful legal analogy well-recognized principles of collateral estoppel (issue preclusion).[19] The legislative task of examining "the facts and circumstances supporting the jury verdict and conviction"[20] will remain important in future cases, not for the purpose of finding facts anew, but rather as an essential step in the process of determining what conduct is established by the record and whether it warrants impeachment and conviction. In sum, "when the courts . . . have found an official guilty of a serious crime," it is not now "necessary to retry the official prior to his or her removal from the Federal payroll."[21]

Let us turn to the second question, whether the burdens imposed on both the House and Senate in Judge Claiborne's case and similar cases are justified. I have already tried to suggest that those burdens can and should be minimized. Indeed, consideration of these Senate Resolutions might reasonably be deemed premature before the Senate has exercised its responsibilities (and done everything that is consistent with fairness to reduce the burdens of the process prescribed by the Constitution). Assuming that, at the end of the process, a perception of unjustifiable burden persists, it is important to test that perception from two perspectives.

First, recognizing that constitutional amendment, no less than impeachment, is heavy artillery, do we really believe that a constitutional amendment is appropriate to deal with a situation that has occurred but once in our history and that may never reoccur? Put another way, are the transaction costs to the Congress of speculative future cases such that they justify the certain, and almost certainly greater, transaction costs that attend the ratification process?

Second, how do the total costs and benefits of an appropriately streamlined impeachment and removal process for convicted judges compare with those of the alternatives that have been proposed? The framers did not intend the impeachment and removal process to be easy. Is the regime prescribed by Senate Resolutions 364 and 370 preferable?[22] Is it clear that conduct, conviction for which is a felony, warrants forfeiture of office and benefits in all cases, and is Congress prepared to surrender its power independently to make a judgment on the facts of each case? How are felonies to be defined, and do the Joint Resolutions contemplate both state and federal convictions? To put an example making some of these questions concrete: If a federal judge were to be convicted in state court of a felony involving consensual sexual conduct with a member of the opposite sex, and were to exhaust opportunities for direct review, are we sure that that individual would be unfit to continue in judicial office? If we go down that road, we are providing a powerful tool to prosecutors not just to exercise discretion against an unpopular judge, but to do so using criminal laws about which there is no national consensus.[23]

* * *

Senate Resolution 370 goes further than Senate Resolution 364, adding a provision that would empower Congress "to set standards and guidelines by which the Supreme Court may discipline judges appointed pursuant to Article III who bring disrepute on the Federal courts or the administration of justice by the courts." It goes on to specify that "[s]uch discipline may include removal

from office and diminution of compensation." In my opinion, this provision is not necessary, and it does not represent good public policy.

As to necessity -- and we are talking about a constitutional amendment -- the present system is working. It simply is not true that the record of the judiciary under the 1980 Act is one of "inactivity."[24] Although I have been a vigorous critic of the judiciary's implementation, my criticisms have focused on procedural rulemaking. All of the councils have rules in place, and pursuant to those rules, the responsible officals have considered hundreds of complaints. Although I continue to believe that there is room for improvement -- a set of model rules presently in the final stages of development may contribute to progress in that direction -- I have no evidence that any Chief Judge, investigating committee or judicial council has failed to take seriously its responsibilities in considering complaints. That few complaints have reached the investigative stage, and that fewer still have resulted in sanctions by a council, is proof not of inactivity but of the high caliber of our federal judiciary. The record since 1980, in other words, tends to confirm Senator DeConcini's observation that "the problem addressed in [the 1980 Act] is more one of perception than actuality. . . ."[25]

As to public policy, we would be foolish to give Congress, by constitutional amendment, a blank check "to set standards and guidelines" for the discipline (including the removal) of federal judges. That is an invitation to the domination of one branch of government by another that should be no less unacceptable today than it was to the framers two hundred years ago. It is no answer that the Supreme Court would be the instrument of Congress for these purposes. The Court would be bound by the constitutional amendment and implementing legislation and would have only as much leeway to "maintain the independence of the judicial branch"[26] as that legislation afforded. Nor is it a comfort that the

legislation would be cabined by the constitutional standard of bringing "disrepute on the Federal courts or the administration of justice by the courts." The capacity of that standard to lead to mischief is well documented in the debates and deliberations that preceded the passage of the 1980 Act.[27] Further, even if we were willing to trust future Congresses to adhere to a principle of generality in enacting implementing legislation, we should be concerned about another danger, the threat that open-ended disciplinary standards and procedures pose to the independence of individual federal judges.

Finally, and of only minor importance in the context of these fundamental objections, Senate Resolution 370 and the implementing legislation it contemplates would effectively transfer to the Supreme Court all of the disciplinary responsibilities of the judicial councils under the 1980 Act. I cannot imagine how that regime could fail to impose an intolerable burden on the Supreme Court, whose travails in meeting its current responsibilities are well known.

* * *

In closing, I wish again to thank the Subcommittee for inviting my views. I regret that I have been so critical of the Senate Joint Resolutions, but I hope that I may at least have contributed to the refinement and improvement of current arrangements.

Footnotes

1. See Burbank, "Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," 131 U. Pa. L. Rev. 283 (1982) [hereinafter cited as "Procedural Rulemaking"]; Burbank, "The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?," 67 Judicature 183 (1983).

2. See Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 21-45 (1985) (hereinafter cited as Oversight Hearing).
3. 132 Cong. Rec. H4718 (daily ed. July 22, 1986).
4. See id. at H4721.
5. See Hearing on the Conduct of Harry E. Claiborne, United States District Judge, District of Nevada, Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986).
6. See H.R. Rep. No. 688, 99th Cong., 2d Sess. (1986) (hereinafter cited as Claiborne House Report).
7. See 132 Cong. Rec. H3288 (daily ed. June 3, 1986).
8. 28 U.S.C. § 372(c)(7)(B)(1982) (emphasis added).
9. See Report of the Proceedings of the Judicial Conference of the United States 5 (March 1979).
10. See H.R. 6330, 96th Cong., 2d Sess. § 2(a) (1980) (proposing 28 U.S.C. § 372(c)(6)(C) and (7)). See also S.1873, 96th Cong., 1st Sess. § 2(a)(1979) (proposing 28 U.S.C. § 372(k)(1)).
11. See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 12-13 (1980) (hereinafter cited as 1980 House Report).
12. See 126 Cong. Rec. 28,092 (1980) (statement of Senator DeConcini) ("In addition, the circuit council may refer any complaint to the Judicial Conference. . . . The council is required to do so if a judge has engaged in conduct which might constitute grounds for impeachment. . . .").
13. 28 U.S.C. § 372(c)(1)(1980).
14. 1980 House Report, supra note 11, at 13.
15. 126 Cong. Rec. 28,097 (1980) (statement of Senator Thurmond).
16. If technical amendments are deemed in order, see Oversight Hearing, supra note 2, they should include the amendment of § 372(c)(7)(B)(i), which may be read to refer to article I

of the Constitution for "grounds for impeachment." Article II sets forth such grounds.

17. I do not explore here whether the Senate should entertain defenses that were available but not raised in the criminal proceedings.

18. See Claiborne House Report, supra note 6, at 5, 22-24.

19. I believe this analogy is more helpful than the concept of judicial or legislative notice referred to in the House Report. See id. at 24; see also 132 Cong. Rec. H4712 (daily ed. July 22, 1986) (statement of Rep. Rodino); id. at H4713 (statement of Rep. Fish); id. at H4715 (statement of Rep. Kastenmeier).

20. Claiborne House Report, supra note 6, at 24.

21. 132 Cong. Rec. S7867 (daily ed. June 18, 1986) (statement of Sen. Thurmond).

22. I will not dwell on the broader scope of S.J. Res. 364, which would apply to "[a]ny officer of the United States appointed by the President with the advice and consent of the Senate," except to ask why present arrangements for the removal of such officers -- except federal judges -- are considered inadequate.

23. The example used in the text suggests a statute not often enforced. A study of crimes defined as felonies in all the states, or even of crimes that meet some proposed federal definition of a felony, would surely unearth statutes that are not desuetudinous but that proscribe conduct which is not obviously inconsistent with holding judicial office.

24. 132 Cong. Rec. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

25. 126 Cong. Rec. 28,091 (1980) (statement of Sen. DeConcini).

26. 132 Cong. Rec. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

27. See Burbank, "Procedural Rulemaking," supra note 1, at 301-04.

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The Law School
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August 13, 1986

Senator Orrin G. Hatch
135 Senate Russell Office Building
United States Congress
Washington, DC 20510

Dear Senator Hatch:

I very much enjoyed the opportunity to testify before the Subcommittee on the Constitution concerning S.J. Res 364 and 370. I hope that my testimony was helpful.

During my testimony, I was asked about improvements in the current statutory arrangements concerning judicial discipline. In response, I referred to the Oversight Hearing held by the House Judiciary Committee's Subcommittee on Courts. Enclosed is a copy of my testimony before the Subcommittee, which appears at pp. 25-38 of the printed hearing record.

I should note that legislation now under consideration by the Senate's Subcommittee on Courts would effect a number of helpful reforms in the area of judicial discipline. I refer to H.R. 3550, The Rules Enabling Act of 1985, which passed in the House on December 9, 1985. Section 3(a) of that bill requires the Administrative Office of the United States Courts to compile periodically the procedural rules of the judicial councils as well as orders that the 1980 Act requires to be publicly available. In addition, Section 4 requires public notice and an opportunity to comment in connection with procedural rulemaking under the Act.

Apart from these provisions, the Rules Enabling Act of 1985 deserves your support. It represents the fruits of the first comprehensive congressional review of federal court rulemaking, both supervisory and local, in more than fifty years. Building on an impressive hearing record, the bill would preserve those aspects of current structure and process that have proved themselves of enduring value, requiring changes only in response to demonstrated problems. Among the bill's important features are the following:

(1) The bill would rationalize and make uniform provisions governing supervisory civil,

criminal and other rules that are presently not uniform;

(2) The bill would repeal the one-House veto provision in 28 U.S.C. § 2076 (Federal Rules of Evidence);

(3) The bill would require that all supervisory rules be consistent with statutes (currently, some such rules supersede previously enacted statutes with which they are inconsistent);

(4) The bill would ensure that recent changes in the supervisory rulemaking process designed to open up that process, which were made in response to demonstrated congressional interest, are preserved. It would also require open meetings by the various committees that recommend rules or amendments to the Supreme Court;

(5) The bill would effect a number of beneficial changes in local court rulemaking, including: requiring the appointment of advisory committees (currently required only of the courts of appeals), requiring notice and comment rulemaking (currently required only of district courts), and prescribing means and standards for the abrogation of invalid local rules.

This list by no means exhausts the useful features of this bill, which reflects a long period of dialogue with the Judicial Conference of the United States. I hope that this effort will not have been wasted. Court rulemaking is not often a highly visible topic, but the rulemakers' proposals to amend Rule 68 remind us that rules of "practice and procedure" can dramatically affect both articulated public policy and the process of securing rights. I urge you vigorously to support the passage of this legislation.

Please let me know if I can be of further assistance to the Subcommittee.

Sincerely,

Stephen B. Burbank
Professor of Law

SBB:mod

Senator HATCH. Thank you very much. We invited a number of scholars to testify on short notice. We are very appreciative that you two could come. None of the others could make it.

There has not been a lot of enthusiasm for this type of a constitutional amendment. Neither of you have indicated much enthusiasm for them either. But be that as it may, you have heard my discussion with Judge Wallace in regard to the term good behavior. Could Congress, by statute, provide for the automatic removal of an article III judge or a life-tenured judge who commits a felony?

Mr. BURBANK. No, but I should repeat that I do not regard myself as a constitutional scholar.

Senator HATCH. Article II limits impeachment to treason, bribery and other high crimes and misdemeanors. Treason and bribery are pretty well defined. The term "high crimes and misdemeanors," is less well defined.

I do not believe that the Supreme Court has been interpretation of that language. What do you think that particular term means?

Mr. BURBANK. I am afraid you do not have long enough to hear my views on that subject. But, happily, for Congress' purposes, the meaning of those words have been explored in a number of reports and various documents that attended the deliberations concerning former President Nixon.

It is clear to me, in any event, from reading that literature that high crimes and misdemeanors is not limited to conduct which is criminal. Similarly, all criminal conduct would constitute high crimes and misdemeanors.

So one could diagram this thing so that there would be overlapping circles, but they are not going to be congruent. Beyond that, it seems to me I do not want to take your time.

Senator HATCH. That is good enough for me. Since the phrase next to treason and bribery is linked to them by the words "other high crimes and misdemeanors," it suggests that the term applies to only serious violations

Does that mean that impeachment is limited to only violations that might be equal to or stronger than treason or bribery?

Mr. BURBANK. I am sorry. The last part of it was does—it mean that——

Senator HATCH. Does that mean that the process of impeachment is limited only to crimes and misdemeanors which would rise to the dignity of treason and bribery?

Mr. BURBANK. I doubt that very seriously because at least with respect to treason, in the view of many people, not only among the framers, but today, there are no crimes that rise that high.

Senator HATCH. That is a good point.

Mr. BURBANK. Bribery—I suppose it depends upon your view. I am not sure that an eiusdom generis approach is useful there; that is to say, all right, we have treason and bribery and we have got to find out whether something rises as high. I think an historical approach to see what would have been considered high crimes and misdemeanors at the time the Constitution was framed is appropriate, and there is plenty of literature that does that.

I think that, at the least, that literature reveals the two propositions that I stated. One, it is not necessary in order to be an impeachable offense that something be criminally proscribed. And,

two, not everything that is criminally proscribed is an impeachable offense.

Senator HATCH. What if either Senator Thurmond's or Senator DeConcini's amendment were passed, ratified and entered into the Constitution? What if Congress attempted to impeach a judge for poisoning a neighbor's cat? Would that be permissible under these amendments?

Mr. BURBANK. I must have misunderstood your question, because I understood your question to say, what if these proposed constitutional amendments were actually passed and ratified by the States.

Then it would be automatic. Once that person was convicted of the felony of poisoning his or her——

Senator HATCH. It would not make any difference.

Mr. BURBANK. It would not make any difference because once that person had exhausted direct appeals, the person would forfeit office.

Senator HATCH. What about current law? Would it make any difference there?

Mr. BURBANK. I am sorry. Would it——

Senator HATCH. Would the type of crime make any difference?

Mr. BURBANK. It should; that is to say, if I were a Congressman, I would not want to vote articles of impeachment against a Federal judge who poisoned his or her neighbor's cat. I might report them to the ASPCA

Senator HATCH. Have you watched the Rehnquist proceedings?

Mr. BURBANK. Some of them. [Laughter.]

Senator HATCH. What recommendations would you have for improvement of the Judicial Tenure and Misconduct Act of 1980?

Mr. BURBANK. There are a few technical amendments, Senator, that are contained in my testimony before the House Judiciary Committee's Subcommittee on Courts at last year's oversight hearing. But they are really technical amendments. There are some questions remaining under the act. For instance, the circumstances in which it is appropriate for a judge against whom a complaint is made to have his or her attorney's fees paid out of Government funds—that is a question that remains, and the extent to which anonymous complaints ought to be sustained under the act.

All I have said today is that, in the context of your deliberations, there is one thing that you might want to consider. If you think that there is a need for technical amendments, you might specify in connection with this certification process, in the case of a judge who has been convicted, those court records that would be most helpful to the House in the context of considering impeachment.

The second thing is that the act may be read to suggest that the grounds for impeachment are stated in article I, whereas, of course, they are stated in article II, so that there is a technical amendment needed there.

But I believe that, to the extent that there are amendments necessary, the House hearing record contains whatever should be considered, and it is not major.

Senator HATCH. Thank you.

Senator Thurmond, do you have any questions?

The CHAIRMAN. I have just one or two.

We are glad to have you with us and appreciate your appearance.

When the Constitution refers to treason, bribery, and other high crimes, have you given consideration to what crimes might be considered high crimes?

Mr. BURBANK. Well, I think that, for instance, murder would probably be considered a high crime, even though it would probably not be the paradigm. For that one would look to crimes that reflect on an individual's ability to hold public office with the trust of the public—and murder, of course, implicates that, but not as centrally as bribery. A public official taking a bribe is an act which reflects on that individual's qualifications to serve, as does treason, of course. So any crime involving an abuse of the public trust of any substance, it seems to me, would be fairly characterized within that ambit.

The CHAIRMAN. You heard Judge Wallace suggest that we might pass a statute to remove officers who are other than article III judges. Would you agree with that?

Mr. BURBANK. I think I agree, but I do not know enough about it. I had a question about the broader ambit of your proposed constitutional amendment. I was not aware of any problem—and this may just be my ignorance—similar to that perceived with respect to Judge Claiborne that exists for other Federal officers. It seems to me that there are a variety of removal provisions. The President is permitted to remove some of the officers who are appointed by the President and approved by the Senate. As to a few others, maybe the Director of the Congressional Budget Office or somebody like that—Congress must be involved. I was not aware that there are any problems for current removal procedures for non-Federal judges that would justify a constitutional amendment.

I am not an expert on that subject, Senator Thurmond. Has the Congress seen a problem outside the area of Federal judges? Are ambassadors hard to get rid of?

The CHAIRMAN. I do not know that there has been any particular problem, but, of course, things have to rise for the first time.

Mr. BURBANK. Surely.

The CHAIRMAN. And I was just wondering if you had in mind——

Mr. BURBANK. Well, I think with respect to all of those non-Federal judges, there are existing removal provisions. Either the President can remove them or they can be removed by Congress pursuant to statute, and I am not aware of any problems.

The CHAIRMAN. In the case of Federal judges like Judge Claiborne now, who has been convicted, would you recommend any type of constitutional amendment to handle that situation, or do you feel it is just better to follow impeachment?

Mr. BURBANK. I would not recommend a constitutional amendment. I think that it would be useful to do what the House did; that is to say, for the Senate to follow suit and streamline its process.

In that regard, I do not know what has happened to the study of the Senate's rules for impeachment that was completed in 1974. The *Claiborne* case resurrected interest in that. It seems to me that that is a very good opportunity for the Senate to deal with a problem like that presented in Judge Claiborne's case, to revise its

rules so as to provide a streamlined process for the trial of impeachments in cases where an individual has been convicted.

If that is done, taken together with provisions that already exist in the rules—for instance, that providing for the delegation of the Senate's responsibilities to a committee of 12, or maybe even less—it seems to me it can be quite a summary process that, given the important public business that presses upon the Senate, nonetheless will be demanding, but not so demanding as to make the Republic fall apart.

I do not think there are going to be too many more, and I hope that there are no more Judge Claibornes who refuse to resign after all direct appeals have been exhausted.

The CHAIRMAN. Under the Senate rules now, a committee of 12 can be appointed to hear testimony. They do not make any recommendation; they merely take the testimony.

Mr. BURBANK. Excuse me, Senator. The Senate might very well want to take a look at that provision and see whether you are, at least in a case like this, providing for enough delegation to spare the whole body.

The CHAIRMAN. In other words, you feel if the Senate saw fit to change the rules somewhat to provide that where there has been a conviction, then there could just be a shorter cut to the process, so to speak——

Mr. BURBANK. Absolutely.

The CHAIRMAN [continuing]. And maybe give 2 hours to the accusor and 2 hours to the accused?

Mr. BURBANK. Well, it seems to me, as I testified, Senator, that when you are talking about a situation like Judge Claiborne's, the question should be—the facts are established by the record—what do we as Senators think those facts implicate in terms of the constitutional standard for removal.

If you think that facts indicating that a Federal judge knowingly and willfully falsified information on his tax return—that that conduct should lead to that person's removal, it is going to be a very short process, indeed.

I would not, in other words, permit the individual to get behind that record.

The CHAIRMAN. Well, would we have to think that ourselves? Suppose the court has already heard it and decided that.

Mr. BURBANK. Well, the court has not heard the question of whether that conduct constitutes grounds for removal by the U.S. Senate. The jury has determined that that conduct justifies conviction.

The CHAIRMAN. Of course, you would have to go through the process here, but I was just thinking if a court had heard it and convicted him, then we could probably consider shortening the process through the rules to just allow, then, for each side to have maybe 2 hours before the Senate.

Mr. BURBANK. Yes, and not permit the respondent to reargue the facts.

The CHAIRMAN. Without going into a committee of 12, maybe, to take a lot of testimony, and so forth.

Mr. BURBANK. It seems to me that I recall reading that, in the last removal trial—of Judge Ritter in 1936—one Member of the

Senate was on the floor. So it may be a small point at which to stick to object to having a committee of 12, and I think it is proposed not even to specify; it might be fewer if the Senate changes the rules.

It might be better to have five Senators paying attention under duly promulgated Senate rules than to have one Senator representing the entire body hearing evidence. So I think it would be a very good opportunity that this case presents to revise the Senate rules, again, with scrupulous fairness to the individual.

But I do not think there is anything unfair in a case like this about foreclosing redetermination of facts.

The CHAIRMAN. Well, thank you very much. I want to ask you this: Where is the school of law located at the University of Pennsylvania, in Philadelphia?

Mr. BURBANK. Yes, sir.

The CHAIRMAN. The school of medicine is there, I know. I had a nephew who graduated in medicine there. Is the entire university there?

Mr. BURBANK. The entire university is there, with the exception of a few ancillary facilities. The dean of the school of veterinary medicine, I am sure, would not like to hear me talk about the facility at New Bolton as ancillary, but, in fact, that is the case.

The CHAIRMAN. Thank you.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Chairman.

We thank you for being with us. We appreciate the advice and counsel you have given to this committee. I basically agree with both of you.

We will adjourn this subcommittee until further notice.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

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